Supreme Court of the United States.

No. 512.—October Term, 1904.

Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and The Equitable Trust Company of New York, Petitioners,
vs.
Northern Securities Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[Argued March 1, 2. Decided March 6, 1905.]

Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York exhibited their bill against the Northern Securities Company in the Circuit Court of the United States for the District of New Jersey, April 20, 1904, on which, with accompanying affidavits and exhibits, a restraining order was issued, pending an application for an injunction as prayed in the bill. April 26 an amended bill was filed, and the application for a preliminary injunction was heard May 20, 21 and 23 by Bradford, J., holding the Circuit Court.

On the fourth day of June a second amended bill was filed, and on July 5, 1904, Judge Bradford delivered an opinion sustaining the application. 132 Fed. Rep. 464.

The order for injunction was entered August 18, 1904, and an appeal therefrom was prosecuted to the Circuit Court of Appeals for the Third Circuit, which, on January 3, 1905, reversed the order. 134 Fed. Rep. 331.

Thereupon complainants applied to this court for the writ of certiorari, which was granted January 30, and the matter advanced for hearing, and heard March 1 and 2. The affirmance of the decree of the Circuit Court of Appeals was announced March 6, it being added that an opinion would be filed afterwards.

The Northern Pacific Railway Company was the successor through reorganization of the Northern Pacific Railroad Company, and by its charter it was provided that its capital stock might be increased from time to time by a vote of a majority of the stockholders, and that the company might, by a like vote, classify its stock into common and preferred, and might "make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors." On July 1, 1896, by the unanimous vote of its then stockholders, the capital stock was increased to one hundred and fifty-five million dollars, divided into eighty millions of common stock and seventy-five millions of preferred stock, and

it was resolved "that such preferred stock shall be issued upon the condition that at its option the company may retire the same, in whole or in part, at par, from time to time, on any first day of January prior to 1917." The plan of reorganization which was adopted provided that as to the new company which it was contemplated should acquire the properties and franchises of the Northern Pacific Railroad Company, and the issue of preferred stock by it, "the right will be reserved by the new company to retire this stock, in whole or in part, at par, from time to time, upon any first day of January during the next twenty years."

All the certificates of stock, whether common or preferred, at that time or subsequently issued, contained this clause: "The company shall have the right at its option, and in such manner as it shall determine, to retire the preferred stock, in whole or in part, at par, from time to time, upon any first day of January prior to 1917."

The reorganization had been managed by J. P. Morgan & Co., and the directory of the Northern Pacific Railway Company were friendly to that firm. During the same period the president of the Great Northern Railway Company was James J. Hill, and its directors were friendly to him.

The two companies were friendly to each other, and in April, 1901, acquired the shares of the Chicago, Burlington and Quincy Railroad Company.

At this time the Union Pacific Railway system included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company, and the railroad of the Oregon Railroad and Navigation Company. The Union Pacific Company was practically the owner of the entire capital stock of the Oregon Short Line Railroad Company, and the latter company was the owner of practically the entire capital stock of the Oregon Railway and Navigation Company. The interests in control of the Union Pacific system might properly be called the Harriman interests. Shortly thereafter, at the instance of the Union Pacific Railway Company and with money furnished by that company, the Oregon Short Line Company purchased Northern Pacific preferred stock to the amount of $41,085,000, and common stock to the amount of $37,023,000, aggregating $78,100,000 of stock, being a majority of the $155,000,000, total capital stock of the Northern Pacific Company as then outstanding. But the preferred stock was subject to retirement at par at the option of the company, and the 370,230 shares of common stock was less than a majority of the total common stock, which majority was held by the Morgan-Hill party.

In October, 1901, complainant Harriman was elected a member of the board of directors of the Northern Pacific Railway Company and James Stillman was re-elected. They were also directors of the Union Pacific Railway Company. They both attended a meeting of the North-

ern Pacific board on November 13, 1901, and Harriman was chosen a a member of the executive committee. At this meeting resolutions were adopted providing for and resulting in the retirement of the preferred stock on January 1, 1902, by the payment of $100 cash for each and every share to each and every holder of record on that day.

These resolutions declared that the company thereby determined to exercise its right to retire the preferred stock; provided that for the purpose of raising the funds necessary to do so, the company should issue its negotiable bonds for $75,000,000, convertible at par into shares of the common stock of the company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder, and arranged for the retirement from and after December 31, 1901, of the $75,000,000 preferred stock, by the payment to each and every holder of record thereof on January 1, 1902, of $100 cash for each and every share.

On November 15, the Executive Committee of the Northern Pacific Company authorized the execution of a contract with the Standard Trust Company of New York for the sale and delivery of the convertible certificates for $75,000,000 provided for in the resolutions.

The preferred stock was subsequently taken up in accordance with the plan resolved upon.

The Northern Securities Company was incorporated under the laws of New Jersey in November, 1901, its articles of association having been filed at Trenton on the thirteenth day of that month, with a capital stock of $400,000,000, divided into 4,000,000 shares of the par value of $100 each, and its objects being certified to be:

"(1.) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

"(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

"(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

"(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

"(5.) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

"The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

"The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State."

On the 14th day of November, 1901, fifteen gentlemen, including complainant Harriman and two other directors of the Union Pacific, James J. Hill, president of the Great Northern, and two members of J. P. Morgan & Co., were elected directors of the Northern Securities Company. Complainant Harriman took his seat at the board and an executive committee of five was elected, of which he was one.

November 15 resolutions were passed authorizing the purchase of the Northern Pacific stock held by Harriman and Pierce, as follows:

"The president stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining $8,915,629, in cash.

"On motion, and by affirmative vote of all the directors present, it was—

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

"*Resolved*, That the president be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent per annum, on the sum receivable for such preferred stock.

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific

Railway Company, passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"*Resolved*, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"*Resolved*, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises."

Complainant Harriman and his co-directors of the Union Pacific were not present at this meeting, but were present at the next meeting of the board on November 19, at which the minutes of the meeting of November 15 were read and on motion were approved.

At a subsequent meeting of the executive committee, in which Mr. Harriman participated, the form of the company's permanent stock certificate, being the usual form, was unanimously approved.

In the meantime, and on November 18, Harriman and Pierce had delivered their Northern Pacific stock to the Northern Securities Company and that company had delivered to them the 824,000 shares of its stock and $8,915,629 in cash.

The Northern Pacific stock certificates received from Harriman and Pierce were surrendered by the Securities Company to the Northern Pacific Railway Company. The certificates for the 370,230 shares of common stock were exchanged for 370,230 shares of common stock issued in the name of the Northern Securities Company. The certificates for the 410,580 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement, and paid for and retired as provided, the transaction resulting in the receipt by the Northern Securities Company of certificates for 347,090 shares of new common stock. This made 717,320 shares, and the Securities Company also acquired 820,270 shares, from a large number of separate individual owners. And from a large number of stockholders of the Great Northern 1,181,242 shares of the stock of the latter company.

At a meeting of the board of directors of the Northern Securities Company on January 22, 1903, at which complainant Harriman was present, the sale by the company of 75,000 shares of its own stock for cash was approved. The second amended bill says $7,522,000 " was issued for cash used for the purchase of other property and for corporate purposes."

From the organization of the Securities Company until the affirmance of the decree in the Government suit, hereafter mentioned, complainants continued to exercise the right of holders of 824,000 shares of stock in

the Securities Company; received their share of dividends, and gave their proxy to vote at the annual meetings of 1902 and 1903.

July 17, 1902, Harriman and Pierce and the Oregon Short Line Company pledged the 824,000 shares of Northern Securities Company stock to the Equitable Trust Company, the Short Line Company executing a trust indenture, which contained this clause: "The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation of the Securities Company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustee shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive and upon receipt thereof shall surrender the deposited stock certificates or other securities."

March 10, 1902, a bill was exhibited in the Circuit Court of the United Stated for the District of Minnesota by the United States against the Northern Securities Company, The Northern Pacific Railway Company, The Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. 209, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which resulted April 9, 1903, in a decision in favor of complainants, 120 Fed. Rep. 721, and a decree as follows:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants,

and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The case was brought to this court, and March 14, 1904, the decree was affirmed. 193 U. S. 197.

March 22, 1904, the board of directors of the Northern Securities Company adopted the following preamble and resolutions:

"Whereas, in the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, in a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

"Whereas, this company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

"Whereas, This company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay:

"*Resolved*, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

"*Resolved*, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

"Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

"The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

"*Resolved*, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice was accordingly given that the meeting of the stockholders would be held on April 21, and a copy of the resolutions and an explanatory letter were sent to the Attorney General of the United States. Early in April the three principal complainants in the present suit presented to the Circuit Court for the District of Minnesota their petition for leave to intervene in the suit of the United States against the Northern Securities Company, setting up substantially the same grounds as in this suit, and seeking similar relief. This application was heard at St. Paul, April 12 and 13. The Government appeared by the Attorney General, and filed a declaration that it was satisfied with the relief granted. April 19, 1904, the court rendered its decision, denying leave to intervene. 128 Fed. Rep. 808.

Up to April 18, 1904, the Securities Company had issued 86,945 certificates of stock and there had been 16,000 transfers registered on the books of the company. At the closing of the transfer books on that day there

were 3,953,971 shares of stock outstanding in the hands of 2,531 separate holders.

The meeting of the stockholders of the Northern Securities Company was duly held April 21, 1904; and at that meeting the stock of the company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Northern Securities Company, was assented to. Two million nine hundred and forty-four thousand seven hundred and forty shares were represented and all voted for the plan adopted by the directors.

As has been stated, the second amended bill was filed after the hearing on the application for the preliminary injunction, and it was therein alleged, among other things, that the Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several States; that the said company was to "acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

"That prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company, had acquired and at the time of the incorporation and organization of said Securities Company owned $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after the incorporation of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of $82,491,871 par value and $8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the 18th day of November, 1901, transfer and deliver to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said

Northern Securities Company representing an interest in $82,491,871 par value and said cash. . . ."

"That at the time of such exchange, on said 18th of November, 1901, it was agreed between said Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

"Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway company acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said anti-trust act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

The prayer of the bill was "that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and such sum in cash as may be just; and that the said defendant Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employees be perpetually enjoined and restrained from in

any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

"Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same."

The proofs embraced the pleadings and decrees in the suit of *United States* v. *Northern Securities Company*; the *ex parte* affidavits of Harriman, Hill, and others; the deposition of Harriman taken before the Interstate Commerce Commission at Chicago in January, 1902; the deposition of Harriman taken in the suit of *Minnesota* v. *Northern Securities Company* in December, 1902; extracts from the minutes of proceedings of the board of directors of the Northern Pacific Railway Company, and of the executive committee and board of directors of the Northern Securities Company.

Mr. Chief Justice FULLER delivered the opinion of the Court:

In applying to this court for the writ of certiorari counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the merits, although its decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court, in such wise, that it might properly have been finally disposed of in terms by its decree, in accordance with the well settled rule upon that subject. *Mast, Foos & Co.* v. *Stove Manufacturing Co.*, 177 U. S. 495; *Castner* v. *Coffman*, 178 U. S. 183; *Knoxville* v. *Africa*, 77 Fed. Rep 501.

In *Western Union Telegraph Company* v. *Pennsylvania Railroad Company*, 195 U. S. 540, 547, the Circuit Court had granted a preliminary injunction, 120 Fed. Rep. 981, which was reversed by the Circuit Court of Appeals. 123 Fed. Rep. 33. The Telegraph Company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the Telegraph Company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the Telegraph Company appealed therefrom to the Circuit Court of Appeals. 195 U. S. 547. We then granted a certiorari, and, considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the Circuit Court, and shall do what the Circuit Court of Appeals might have done, that is, finally dispose of the case by our direction to the Circuit Court.

Complainants deny that the Securities Company became the owner of the Northern Pacific Railway shares, and assert to the contrary that the company held the shares as a trustee or a bailee for complainants.

And the principal ground on which this contention is rested is that it was so adjudicated by the Circuit Court for the District of Minnesota in the Government suit, by the decree of April 9, 1903, affirmed by this court.

It may be said in passing that complainants were not parties of record to that suit, and that they were not parties by representation, if the effect of the transfers as between the parties thereto had been in issue and the vital conflict between complainants and the corporation, now set up, then existed, which would destroy the community of interest on which the rule of representation is founded. And, on the other hand, in that suit the Northern Securities Company, at a time when complainant Harriman was a director, answered that: "Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of the defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders and officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts or controls to any extent any use of the same which might lawfully be exercised by any other owner of said stocks."

But we are of opinion that the Circuit Court did not determine the quality of the transfer as between the defendants themselves, nor was that the purpose of the Government proceedings.

The decree of April 9, 1903, adjudged that defendants had theretofore entered into a combination or conspiracy in restraint of trade and commerce; that all stock of either of the railway companies then held or owned by the Securities Company was acquired and held in virtue of such combination; and enjoined the Securities Company and the two railway companies from receiving, or permitting the exercise of, any control by the Securities Company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities Company; and the Securities Company was forbidden from acquiring further stock of either of the railway companies and it was provided that nothing should be construed as prohibiting the Securities Company from returning and transferring the railway shares to the original railway stockholders who had delivered their shares

to the Securities Company for shares of its stock; or to such person or persons as might be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the railway companies.

This did not involve a decision that any original vendor of the railway shares was entitled to a judicial restitution thereof, and such was the view of the Circuit Court itself, for in its opinion of April 19, 1904, the Court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned or exclude other methods of disposition of it that, in view of all the circumstances, might appear to be

more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The decree of April 9, 1903, was affirmed by the judgment of this court, which, of course, went no further than the decree itself. We did, indeed, by our judgment leave the Circuit Court at liberty "to proceed in the execution of its decree as the circumstances may require," but this did not operate to change the decree or import a power to do so not otherwise possessed.

Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.

This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohens* v. *Virginia*, 6 Wheat. 399; *Caroll* v. *Caroll's Lessees*, 16 How. 297. But we do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation as between the Government and the defendants, the Securities Company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

Treating the question as an open one, it seems to us indisputable that, as between these parties, the transaction was one of purchase and sale. The situation is thus well put by Dallas, J.:

"The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was 'to purchase said stock . . . at an aggregate price of $91,407,500, payable, as to $82,491,871

thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and, as to $8,915.629, in cash.' It is obvious that this resolution contemplated a 'purchase,' and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. . . . The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged."

And the Securities Company sold 75,000 shares of its stock for $7,522,000 cash, "used," as stated in the bill, "for the purchase of other property and for corporate purposes."

But assuming that the transaction was in form, and at least *prima facie* in substance, one of purchase and sale, it is denied that the equitable title vested because, as alleged in the second amended bill, there was an agreement by the promoters of the Securities Company, carried out by that company, that the latter should "acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depository, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." And here again we concur in the views of the Circuit Court of Appeals as expressed by Judge Dallas.

"The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that 'they further stated that, upon the organization of the proposed holding company,' not that it would take as custodian or trustee, but that 'they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company.' These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily aban-

doned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made."

Complainants' counsel say, in respect of Mr. Harriman's testimony that the transaction was an unconditional purchase and sale, that he only swore to his opinion on a question of law. This will hardly do when applied to testimony as to what was said and done in conference with the alleged promoters of the Securities Company. When Mr. Harriman testified that he attached to his negotiations in the sale of Northern Pacific stock no other condition than that of the price, and that the transaction was completed, how can complainants be permitted to deny that this was a statement of fact? And how can the establishment of the contract and its terms as embodied in the resolutions of November 15, 1901, approved at the succeeding meeting by the vote of Mr. Harriman, and which appeared to be, and were testified to by Mr. Hill, President of the Securities Company, as constituting, the only contract which was made and authorized, be overthrown in the absence of any evidence to the contrary?

The consideration received by complainants consisted of money and Northern Securities stock certificates. Those certificates were in common form, and each was a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation. By the provisions of the corporation act of New Jersey, and its certificate of incorporation, the Securities Company had power to acquire and to hold, and at any time to sell, the shares of other corporations. And under that act it had power, in the discretion of its directors and of the holders of two-thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation and distribute its assets. Complainants subjected themselves to this power in accepting the shares of the Northern Securities Company, and their unqualified transfer of their railway stock was inconsistent with any obligation of the Securities Company to retain the railway shares for any particular period.

In acquiring the Securities stock, complainants acquired the ordinary rights of stockholders in New Jersey business corporations, including the right to receive dividends, and to share in the distribution of the assets of the corporation on its dissolution, or of any surplus of assets on reduction of its capital stock. In view of the decree of the Circuit Court for the District of Minnesota in the Government's suit the continued ownership of the railway shares became useless to the stockholders of the Securities

Company, and accordingly the directors decided to reduce the capital stock and distribute the surplus of assets created by that reduction, and the resolutions to that end were ratified by a vote of more than two-thirds of the Securities shares.

By the transfer of the Northern Pacific shares and the payment therefor as agreed the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder alone remained executory. And when the Securities Company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them and not in repudiation of it. It is the complainants who are seeking the determination and repudiation of the contract. Their final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal courts.

And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*. "The general rule, in equity, as at law," said Mr. Justice Gray in *St. Louis, Vandalia & Terre Haute Railroad Company* v. *Terre Haute & Indianapolis Railroad Company*, 145 U. S. 393, "is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall. 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298. . . . When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, above cited; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284."

That was a suit in equity by the maker of an unauthorized lease of a railway and franchises, against the lessee, to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for nine hundred and ninety-nine years, of which but a few years had elapsed at the date of the attempted rescission.

The illegality of the lease and the consequent breach of public duty were manifest, but the right of the lessor, therefore, to maintain the suit was denied by this court.

In the present case complainants seek the return of property delivered to the Securities Company pursuant to an executed contract of sale on the ground of the illegality of that contract, but the record discloses no special considerations of equity, justice or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery.

The Circuit Court decrees put at rest any question that the ratable distribution resolved upon was in violation of public policy.

And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman law and the purposes of the Government suit.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

While the superior equities, as against complainants' present claim, of the many holders of Securities shares who purchased in reliance on the belief that they thereby acquired a ratable interest in all of the assets of the Securities Company, are too plain to be ignored.

The illegal contract could not be made legal by estoppel, but the ownership of the assets, unaffected by a special interest in complainants, could be placed beyond dispute on their part by their conduct in holding the Securities Company out to the world as unconditional owner.

And, without repeating in detail what has been already set out, it is plain that right of rescission of the executed contract of November 18, 1901, even if rescission could have otherwise been sustained, had been lost by acquiescence and laches at the time this bill was filed.

Since the transfer of that date Securities stock had passed into the hands of more than 2,500 holders, many of them in Great Britain, France and other parts of Europe; nearly a year after the filing of the Government bill 75,000 shares were sold for cash, complainant Harriman concurring; some months after, Harriman and Pierce and the Oregon Short Line Company pledged their 824,000 shares to the Equitable Trust Comany; notwithstanding the decree of April 9, 1903, they stood upon their rights as shareholders; and it was not until after March 22, 1904, when defendant's board of directors resolved upon a ratable distribution that complainants undertook to change an election already so pronounced as to be irrevocable in itself in view of the rights of others.

We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the

facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Perhaps it should be noticed that the bill sought the return of two parcels of Northern Pacific common stock, the 370,230 shares delivered to the Securities Company, November 18, 1901, and the 347,090 shares received December 27, 1901, from the Northern Pacific Company on the retirement of preferred stock.

Early in 1901 the Hill-Morgan party held a majority of the common stock, and had asserted the intention to retire the preferred stock, "without," as Mr. Harriman testified, "affording the holders of the preferred stock the right to participate in any new securities that might be issued."

With full knowledge of that intention the proceedings of the two companies followed in November, 1901, and the absolute and unconditional sale and purchase, as we hold the transaction to have been.

We find no evidence of any express agreement that complainants should be entitled to the new common stock, and it was certainly not the natural increase of the old stock, but the result of the exercise of the right of subscription. The purchase by the Securities Company was on its own account and not in trust, and cannot be disturbed because of illegal purpose at the clamor of parties *in pari delicto*. And there is here no offer of the restoration of the *status quo*, if that were practicable.

Doubtless it became the duty of the Securities Company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results.

In fine, the title to these stocks having intentionally been passed, the former owners or part of them cannot reclaim the specific shares and must be content with their ratable proportion of the corporate assets.

Decree affirmed; cause remanded to Circuit Court with a direction to dismiss the bill.

True copy.

Test:

Clerk Supreme Court, U. S.